Briefly stated the facts were as follows :—

On the 14th and 15th of April last one Ong Thuan Chye received a letter demanding the payment of $5,000 and containing threats. He took this letter to the Police. On the 23rd April the Police searched the house occupied by the appellant and one Gurmukh Singh and there found a locked wooden chest. In this chest was found another letter addressed to Ong Thuan Chye which referred to a previous demand and warned the recipient that "this letter is last and final". Also a key was found in the same chest which fitted the door of another house also occupied by the appellant. When this second house was searched two more extortionate letters were discovered in the drawer of a writing table which were addressed to two Chettiars in Ipoh. The handwritings in the letter received by Ong Thuan Chye, the letter found in the chest and the two letters found in the drawer of the writing table were similar. Gurmukh Singh produced the key which was used to open the wooden chest and he admitted writing the letter received by Ong Thuan Chye. He endeavoured to explain that he did not understand the intent behind that letter but this, quite rightly in our opinion, was rejected by the trial Judge. When this explanation is rejected the only connection between the appellant and the letter received by Ong Thuan Chye appears to be that the writer of that letter lived in the same house as the appellant and that letters in similar handwriting were found in another house also occupied by the appellant. In our opinion these facts, though they raise grave suspicion, are not sufficient to prove beyond reasonable doubt that the appellant was aware of the contents of the letter addressed to Ong Thuan Chye or indeed that he had any knowledge of that letter at all. For this reason the conviction on the first charge must be quashed.

On the second charge the evidence is clear that the letters addressed to the two Chettiars were found in the drawer of a writing table and there was no evidence of any attempt to transfer them by any means to the addressees. The mere act of writing and detaining a letter is not an attempt to commit extortion but at the most a preparatory step towards the commission of that offence. The gist of the offence of extortion is putting another person in fear of an injury and similarly to support a conviction for attempted extortion the intending extortioner must have done some act with this intention. For this reason the conviction on the second charge is also quashed and the appeal of Arjan Singh allowed on both charges.

With regard to Gurmukh Singh he was convicted on both charges and sentenced as follows :—

1st Charge : 2 years R.I. and 12 strokes of the rattan.

2nd Charge : 2 years R.I. concurrently with the sentence on the 1st Charge.

Since Gurmukh Singh did not appeal we are unable to make any order with regard to his conviction on the second charge.

But, for the same reasons as set out in paragraph 3 of this judgment in respect of the conviction of Arjan Singh on the second charge we consider Gurmukh Singh's conviction on that second charge was wrong. We recommend that His Excellency the Governor should exercise his power of pardon in respect of the sentence of Gurmukh Singh on that second charge.

If such power is exercised it will make no difference to the sentence now being served by Gurmukh Singh, because the sentences on both his convictions have been ordered to run concurrently.

Appeal Allowed.

NIK HASSAN BIN NIK HUSSIN & ANOTHER v. PUBLIC PROSECUTOR.

[Ct. of Cr. App. (Willan, C.J. Malayan Union, Murray-Aynsley, C.J. Singapore and Carey, J.) September 4, 1947]
[Kelantan — Criminal Appeal No. 67/47]

Penal Code, S. 402 — Assembling with others for the purpose of committing gang robbery — Conspiracy — Evidence Enactment S. 10.

The appellants in this case were convicted in the High Court at Kota Bahru of assembling with others for the purpose of committing gang robbery contrary to S. 402 of the Penal Code. The allegation of the prosecution was that at about 1.30 a.m. on the 10th December, 1944, nine men assembled at a hut on a piece of high ground under scrub for the purpose of committing robbery at the house of one Sulaiman about 100 to 200 yards distance.

Held, that on a charge of assembling with others to commit gang robbery, the purpose of the assembly must be proved. When the only evidence of this was technically inadmissible, the conviction would be set aside.

COURT OF APPEAL.

Appellants in person.

C. M. Sheridan (Crown Counsel) for the Respondent.

The Judgment of the Court was delivered by :—

Willan, C. J. : — These two Appellants were convicted in the High Court at Kota Bharu of assembling with others for the purpose of committing gang robbery contrary to Section 402 of the Penal Code and were sentenced to 5 years R.I. each.

They appealed against these convictions and sentences. Their appeals were allowed and the convictions quashed.

The allegation of the prosecution was that at about 1.30 a.m. on the 10th December 1946, nine men assembled at a hut on a piece of high ground under scrub for the purpose of committing robbery at the house of one Sulaiman about 100 to 200 yards distant.

The first witness called by the prosecution at the trial of five of the nine men gave evidence that at about 6 o'clock p.m. on the evening in question, as he was fishing in a water-channel about 200 yards distant from the said hut, one Derahman came and told him to stop fishing and go home as people were going to commit a robbery at Sulaiman's house.

The second witness called by the prosecution, having seen some eight men about midnight in the neighbourhood of the hut, called others to investigate and ultimately the Penghulu of the district was sent for and arrived with fifty men. One man was found outside the hut and arrested. He was the second of the five men charged and is the first appellant, Nik Hassan. When the Penghulu ordered the arrest of this man, about eight others ran out of the hut. The Penghulu's 50 men gave chase and about 400 yards away a second man was caught in a bush. He was the first accused of the five charged and convicted and has not appealed. It is alleged that on being captured he gave the names of others accompanying him to the Penghulu. The learned Judge properly rejected this evidence. The remaining three men charged and convicted were arrested at 7 a.m. next morning on the road. They had arrived at a certain man's house about three miles from the hut in question at about 2 a.m. and had slept in this man's house for the remainder of the night. The house of one of these three men (their spokesman) was about five miles from where they slept.

There are varying accounts as to weapons carried by the nine men — parangs of one kind or another and one gun. A gun was found in a water-course through which the fugitive men are alleged to have run, about 9 days later. This was at a spot about 60 yards from the hut in question.

That is a precis of the evidence on which the prosecution relied.

Now the statement made by Derahman to the first witness as to people being about to commit a robbery was admitted in evidence possibly on the assumption that Derahman was one of the witnesses being called. Section 10 of the Evidence Ordinance provides :—

> Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons, in reference to their common intention after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

The Derahman who is alleged to have given the warning was not one of the accused men and was not called as a witness. The evidence given by the 1st witness as to what Derahman said to him is therefore merely hearsay and is inadmissible. Excluding this evidence, there is nothing to indicate for what purpose the persons were assembled at the hut. This element of the crime alleged is therefore entirely dependent on suspicion, and is not proved.

The first appellant admits having been in the hut with the first accused (who has not appealed) but he gives an explanation consistent with his innocence of their presence and denies the presence of any others. The Penghulu's fifty men only caught these two of the nine they allege were there.

As against the 2nd appellant, there is merely a suspicion based on the fact that he slept for the later part of the night in question at a house three miles away from the hut and five miles from his own home. He also gives a plausible explanation of why he and the remaining two persons (Accused 4 and 5 in the High Court trial) slept at that house and he alleges that the time of their arrival there was 9.30 p.m. and not "about 2 a.m." as alleged by their host, who admittedly had no time-piece.

In his grounds of judgment the learned trial Judge says :—

> "In this case five men are charged with assembling for gang robbery. On the evening before the incident an independent witness (the first witness) was told to leave his fishing and go home because there was going to be a robbery near the spot. This was tendered as antecedent evidence of the existence of a conspiracy. I think it was admissible but, in view of the subsequent evidence, not important".

It would seem therefore that the learned trial Judge misdirected himself as to what Derahman said being admissible.

In the above circumstances, the appeal of each of the two appellants was allowed and inasmuch as the same considerations apply to the convictions of the 1st, 4th and 5th accused, who have not appealed, a recommendation will be made to His Excellency the Governor to grant a free pardon to each of them*.

Appeal Allowed.
Convictions Quashed.

* Note:— Only two out of five persons convicted having appealed, H.E. the Governor of the Malayan Union was pleased to grant a free pardon to the other three. Ed. M.L.J.